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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR EXTENSION OF TIME ON BENEFICIAL)	
WATER USE PERMIT NO. P-022047-g41E)	FINAL ORDER
GRANTED TO HAROLD SHERVIN AND)	
CLAUDETTE SHERVIN)	

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the November 22, 1989 Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

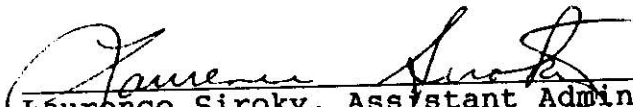
ORDER

The Application for Extension of Time to perfect Beneficial Water Use Permit No. 22047-g41E by Harold and Claudette Shervin is hereby granted. The diversion and distribution works shall be completed, and water shall be applied to a beneficial use as specified in the permit on or before November 30, 1990. The Notice of Completion of the Permitted Water Development, Form

CASE # 22047

617, shall be filed with the Department on or before November 30, 1990.

Dated this 5 day of January, 1990.


Laurence Siroky, Assistant Administrator
Department of Natural Resources
& Conservation
1520 East 6th Avenue
Helena, MT 59620-2301

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record, at their address or addresses this 5th day of January, 1990, as follows:

Harold and Claudette Shervin
P.O. Box 614
Boulder, MT 59632

Estates of William A. Twohy
and Eve D. Twohy
c/o Robert T. Cummins
One North Last Chance Gulch
Helena, MT 59601

John Carey Ranch and
Carey Brothers Partnership
2050 Highway 69
Boulder, MT 59632

R. Bruce Loble
Attorney at Law
P.O. Box 1145
Helena, MT 59624

Tom Carey Cattle Company
P.O. Box 47
Boulder, MT 59632

T.J. Reynolds
Helena Field Manager
1520 East 6th Avenue
Helena, MT 59620
(interdepartment mail)


Irene V. LaBare
Legal Secretary

BB

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR EXTENSION OF TIME ON BENEFICIAL)	PROPOSAL FOR DECISION
WATER USE PERMIT NO. 22047-g41E BY)	
HAROLD AND CLAUDETTE SHERVIN)	

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on June 21, 1989 in Helena, Montana.

Applicant for Extension of Time, Claudette and Harold Shervin (hereafter referred to as Applicant), was represented by C. Bruce Loble, attorney at law. Terry Lindsay of Lindsay & Son Drilling appeared as witness for the Applicant.

Objectors, the Estates of William A. Twohy and Eve D. Twohy, Tom Carey Cattle Company and John Carey Ranch and Carey Brothers Partnership appeared by and through Robert T. Cummins, attorney at law. Tom Carey also appeared as witness for the Objectors.

T. J. Reynolds and Jim Beck, both with the Helena Water Rights Bureau Field Office of the Department of Natural Resources and Conservation (hereafter, the "Department"), were present at the hearing.

MOTION

The Objectors moved to dismiss the hearing for lack of jurisdiction by the Department. The Objector cites two statutes

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§§ 85-2-310(4) and 85-2-402(2), MCA, and Rule 36.12.808, Administrative Rules of Montana, as the basis of their motion.

Under § 85-2-310(4), MCA, the Objectors argue the Department should find the permit is neither in good faith nor shows a bona fide intent to appropriate water. They also argue this section requires a project plan to not exceed ten years from the time of issuance of the permit until completion of the project.

The intent of this statute is to address how the Department processes applications for water use permits. Section 85-2-310(4), MCA, states in pertinent part as follows:

For all applications filed after July 1, 1973, the department shall find that an application is not in good faith or does not show a bona fide intent to appropriate water for a beneficial use if:

. . .

(c) (iii) for an appropriation of 4,000 acre-feet a year or more and 5.5 cubic feet per second or more, a detailed project plan describing when and how much water will be put to a beneficial use. The project plan must include a reasonable time line, not to exceed 10 years from the time of issuance of a permit, for the completion of the project and the actual application of the water to a beneficial use. . . .

This language, adopted in 1987, applies to applications processed by the Department after it was effective and does not include permits issued before 1987. Therefore this section does not apply to this proceeding, since the provisional permit in this matter was issued prior to this 1987 amendment.

Furthermore, the ten-year limitation applies only when the requested appropriation is 4,000 acre-feet per annum and 5.5 cfs

or more. This proceeding involves a permit, and not an application. Most importantly, the permitted appropriation is less than the 4,000 acre-foot and 5.5 cfs required by § 85-2-310(4)(c)(iii), MCA. Therefore § 85-2-310(4)(c)(iii), MCA, is not applicable here.

The Objectors also contend that § 85-2-404(2), MCA, and ARM 36.12.808 require a finding that the Shervin permit has been abandoned or the permit revoked. This section states as follows:

If an appropriator ceases to use all or part of his appropriation right or ceases using his appropriation right according to its terms and conditions for a period of 10 successive years and there was water available for his use. There shall be a prima facie presumption that the appropriator has abandoned his right in whole or for the part not used.

Section 85-2-404(2), MCA, does not apply in this instance because water has never been put to a beneficial use by the Applicant under this permit. This statute applies to an appropriator who has used his water rights and then discontinued his use of all or part of his water right for a period of ten successive years after the water rights have been decreed and water has been available for the intended use.

ARM 36.12.808 lists the reasons for a department recommendation to revoke a permit which includes the failure to perfect the permit within the completion period, see ARM 36.12.808(1).

The Applicant is presently seeking in this matter to extend his time limit to complete this permitted project under

§ 85-2-312(3), MCA. The Applicant has followed the proper statutory procedures in seeking previous extensions. Therefore, ARM 36.12.808 is not applicable here.

EXHIBITS

Applicant offered six exhibits for inclusion into the record.

Applicant's Exhibit 1 are copies of proposals for irrigation equipment from VanDyke Irrigation Service of Bozeman and Valmont of Montana of Belgrade both obtained in 1985. Included is a copy of page 3 of 3 from Northwest Irrigation Inc. of Townsend, Montana. This document includes in general terms the conditions of the method of payment, company policy and excavation restrictions, (pages 1 and 2 of 3 for this proposal, dated April 9, 1986, in the file).

Applicant's Exhibit 2 are copies of two bills, one from Montana Power for the service period from April 10, 1989 to May 12, 1989. A bill from Lindsay Drilling for a pump test on a well performed on March 28, 29, 30, 31, and April 4, of 1989.

Applicant's Exhibit 3 is a copy of a combined bill from Lindsay & Sons Drilling for a pump test described in Exhibit 2 and pump installation charges performed on June 13, 1989.

Applicant's Exhibit 4 are copies of a letter dated June 12, 1989 to Bruce Loble from VanDyke Irrigation Service Inc., a map showing the proposed 300 acres of irrigation cross-hatched in orange and 70 acres of irrigation cross-hatched in yellow and a

working copy of a preliminary irrigation design for the Applicant.

Applicant's Exhibit 5 is a letter dated June 20, 1989, from Casey Reilly, President of First Citizen's Bank of Butte, Montana to Bruce Loble regarding possible future financing.

Applicant's Exhibit 6 is the Devil's Fence Quadrangle published by the U.S. Geological Survey showing the approximate locations of the Applicant's and Objector's wells. This exhibit was admitted for illustrative purposes only.

Applicant's Exhibits 1 and 6 were admitted without objection. Objections were raised with the admission of Applicant's Exhibits 2 through 5. The basis of these objections was that these exhibits represent actions by the Applicant occurring during the temporary extension authorized by the Department on November 11, 1988. The deadline authorized by the second extension of time was December 1, 1988. Section 85-2-312(3), MCA, states in relevant part:

The department may, upon a showing of good cause, extend time limits specified in the permit. . . . The department may issue an order temporarily extending the time limit specified in the permit for 120 days or until the department has completed its action under this section, whichever is greater

This section does not seem to discriminate against any continued development towards the completion of the permit. The actual time limit of the permit or any authorized extension is temporarily extended in this section by the Department until a decision is rendered. Any work performed toward the completion

of the project under the temporary extension would be at the Applicant's own risk if the extension was denied. Therefore, the objections to the admission of the Applicants's Exhibits 2, 3, 4, and 5 are overruled.

Objectors offered nine exhibits for inclusion into the record:

Objectors' Exhibit 1 is to the file for Provisional Water Use Permit No. 22047-g41E.

Objectors' Exhibit 2 is the file for Provisional Water Use Permit No. 22048-g41E.

Objectors' Exhibit 3 is a two-page copy of Provisional Water Use Permit No. 26085-g41E by Tom Carey Ranch Co.

Objectors' Exhibit 4 is a copy of Certificate of Water Right No. 45644-g41E by Tom Carey Ranch Co.

Objectors' Exhibit 4A is a copy of Certificate of Water Right No. 45645-g41E by Tom Carey Ranch Co.

Objectors' Exhibit 5 is a copy of Certificate of Water Right No. 65133-g41E by Tom Carey Cattle Co.

Objectors' Exhibit 6 is a copy of Certificate of Water Right No. 25408-g41E by John Carey Ranch Inc.

Objectors' Exhibit 7 is a copy of Certificate of Water Right No. 57007-g41E by John Carey Ranch Inc.

Objectors' Exhibit 8 is a copy of Permit to Appropriate Water No. 22047-g41E by Lawrence Schreder.

Objectors' Exhibits 1 through 8, with the exception of Exhibit 2, were admitted without objection. An objection was

raised with the admission of Objectors' Exhibit 2 in this matter. Furthermore, the Applicant objected to the admission of any and all evidence in the file concerning Permit No. 22048-g41E on the basis of being irrelevant in this matter. The objection raised by the Applicant against the admission of Permit No. 22048-g41E shows that the two irrigation projects are separate systems and independent of each other. Therefore, the objection to the admission of Objectors' Exhibit 2 is sustained.

The Department file was made available at the hearing for review by all parties. Neither party objected to the admission of any part of the file referring to Permit No. 22047-g41E, except as previously addressed in the Applicant's objection to Objectors' Exhibit 2. Therefore, the Department file in this matter is included in this record, noting the exception above.

PRELIMINARY MATTERS

Several objections were raised during the course of this hearing. These objections were based on two levels of argument: relevancy of testimony and hearsay evidence. At the beginning of the hearing it was agreed upon by all parties that the hearing would not be conducted using common law and statutory rules of evidence. The formal rules of evidence were therefore waived. Hearsay evidence was generally admitted into the record but was given very little weight in this decision. Relevancy of certain testimony is addressed as to its merits in the Findings of Facts and Conclusions of Law.

FINDINGS OF FACT

1. On January 30, 1981, Provisional Permit to Appropriate Water No. 22047-g41E was granted to Lawrence S. Schreder with a priority date of March 7, 1979. Schreder was required under the terms of the permit to perfect the permitted appropriation, i.e., to have completed the appropriation works, and have applied water to beneficial use as specified in the permit, on or before October 1, 1982. The Notice of Completion of the Water Development, Form 617, was to have been filed on or before December 1, 1982.

2. On January 7, 1983, the Permittee requested more time to perfect the permit. On January 18, 1983, the Permittee was granted an Extension of Time to perfect the appropriation. The extension allowed the Permittee to perfect the appropriation on or before November 30, 1984.

3. On September 24, 1984, the Permittee requested a second extension to perfect the permit. On October 11, 1984, the Permittee was granted a second Extension of Time to perfect the appropriation. Under the Extension, the Permittee was to have perfected the appropriation on or before December 1, 1988.

4. On November 28, 1988, the Applicant requested a third extension stating that "unable to complete this project due to depressed ranch economy and lack of financing". A temporary extension was subsequently granted on November 29, 1988, and pertinent portions of this Application for Extension of Time were

published in the Boulder Monitor, a newspaper of general circulation in the area of the source, on December 29, 1988.

5. The application received timely objections from the Estates of William A. Twohy and Eve D. Twohy, Tom Carey Cattle Co., John Carey Ranch and Carey Brothers Partnership. Each Objector alleged that the Applicant has not diligently pursued perfection of the appropriation, ten years of nonuse constitutes abandonment and therefore infringing upon a water reservation.

6. On September 23, 1985, the Applicant obtained a bid proposal from VanDyke Irrigation Service, Inc. of Bozeman. The bid proposal was not signed by any party signifying acceptance (Applicant Exhibit 1).

7. On April 9, 1986, the Applicant obtained a bid proposal from Northwest Irrigation, Inc. of Townsend, Montana. This proposal was not signed by any party signifying acceptance (Department file).

8. The Applicant objected to any and all portions of File No. P22048-g41E being made a part of this record (Objectors' Exhibit 2). The Applicant further stated, "if there is anything in the Department's file. . . that refers to 48, I think that should be expunged from that particular file. I will not agree that 48 has any relevance here."

9. A pump test on the Applicant's well, the diversion for Permit No. 22047-g41E was performed in March and April of 1989. (Applicant's Exhibits 2 and 3)

10. A design for 300 acres of sprinkler irrigation by means of a pivot was drafted by VanDyke Irrigation Service, dated June 12, 1989.

11. Terry Lindsay, a water well driller, was knowledgeable with all the parties' wells, except one listed in Objector's Exhibit 7, testified that the Objector's wells would not be adversely effected by the Applicant's diversion. (Testimony of Lindsay.)

12. The legal land description shown on Objector's Exhibit 7 locates this stock well in a drainage basin with no hydrologic connection to the Applicant's diversion shown on the permit.

CONCLUSIONS OF LAW

1. Section 85-2-312(3), MCA, states in pertinent part:

The department may, upon a showing of good cause, extend time limits specified in the permit for commencement of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use. All requests for extensions of time must be by affidavit and must be filed with the department prior to the expiration of the time limit specified in the permit or any previously authorized extension of time. The department may issue an order temporarily extending the time limit specified in the permit for 120 days or until the department has completed its action under this section, whichever is greater. Upon receipt of a proper request for extension of time, the department shall prepare a notice containing the facts pertinent to the request for extension of time and shall publish the notice in a newspaper of general circulation in the area of the source. The department may serve notice by first-class mail upon any public agency or other person the department determines may be interested in or affected by the request for extension of time. The department shall hold a hearing on the

request for extension of time on its own motion or if requested by an interested party. . . .

2. The Department has jurisdiction over the subject matter herein, and over the parties hereto. Section 85-2-312(3), MCA.

3. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule appearing fulfilled, the matter is properly before the Examiner.

4. The Applicant for the Extension of Time must show reasonable diligence of good faith effort towards the completion of the appropriation works and putting water to a beneficial use. See In the Matter of the Application for Extension of Time to Perfect Beneficial Water Use Permit No. 39787-s76M Transferred to Marvin and Mary Ann Rehbein, Proposal for Decision, June 16, 1988, pp. 5-9 (Final Order, January 24, 1989).

5. Granting of a previous extension is prima facie evidence of reasonable diligence on the part of the Applicant prior to that extension. See In the Matter of the Application for Extension of Time to Perfect Beneficial Water Use Permit No. 24875-g41H, City of Belgrade, Proposal for Decision, pp. 6-7.

6. Reasonable diligence is the steady good faith effort toward perfecting the permit. The Applicant's objections raised with not allowing the inclusion of Permit No. 22048-g41E into the record shows a lack of diligence with respect to this project being related to this matter in Permit No. 22047-g41E. These two

irrigation projects are separate and independent of each other and therefore diligence cannot be shown to exist between them.

The record shows that the Applicant pursued on two occasions to obtain proposals for bids on irrigation systems, see Findings of Fact 6 and 7. The Department has previously held that an extended search for a good deal does not in itself constitute reasonable diligence. See In the Matter of Beneficial Water Use Permit No. 38493-s430J Issued to Ferdinand Stricker, Order, October 21, 1987, where all the Permittee did in five years was occasionally shop for a bargain. This search was not sufficient to show good faith.

However, the bids were obtained in this case to determine whether or not the Applicant could financially meet the obligations of such a major expense and was not merely shopping around for a good deal.

Terry Lindsay's testimony showed he was familiar with all the wells in the general area of the Applicant's well. Lindsay testified that the Applicant's well would not adversely impact the Objector's down gradient wells because of the distance between them. Further, the Objector's two other wells would not be impacted because of their locations up gradient from the Applicant's well.

The Applicant also hired a well driller to conduct a pump test on this diversion to determine if the well could still produce the amount of water necessary to perfect the intended project. Since the pump test was performed under the temporary

extension, this shows the Applicant was willing to risk this expense, even though he is not guaranteed the extension of time to perfect the permit will be granted.

The Applicant also had VanDyke Irrigation Systems draft a preliminary design of a pivot irrigation system while under the temporary extension.

By the granting of this extension, I do not wish to start a pattern of encouraging this practice of working on the appropriation works during the authorized temporary extension. If we start recognizing this activity during the temporary extension, it would only serve to encourage last minute attempts at diligence. The Applicant in this case was not warned of this, and this section (85-2-312(3), MCA) in the law does extend the time limit, even though it is temporary.

I do not feel it is correct to deny this Applicant an extension in this case, due to this interpretation, and will allow the activities which occurred during the temporary extension to be included in this decision. Therefore, based on the foregoing the Examiner concludes that the Applicant has exercised reasonable diligence. Thus, there is sufficient cause to grant an extension.

WHEREFORE, the Examiner proposes the following:

PROPOSED ORDER

The Application for Extension of Time to perfect Beneficial Water Use Permit No. 22047-g41E by Harold and Claudette Shervin is hereby granted. The diversion and distribution works shall


be completed, and water shall be applied to a beneficial use as specified in the permit on or before November 30, 1990. The Notice of Completion of the Permitted Water Development, Form 617, shall be filed with the Department on or before November 30, 1990.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearings Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, no new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 22nd day of November, 1989.


Keith Kerbel, Hearing Examiner
Department of Natural Resources
and Conservation
1537 Avenue D, Suite 105
Billings, MT 59102

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was served by mail upon all parties of record at their address this 22nd day of November, as follows:

Harold and Claudette Shervin
P.O. Box 614
Boulder, MT 59632

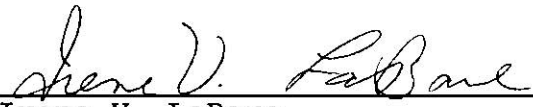
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